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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1189

THE STATE OF NEW JERSEY and
HOWARD YEAGER,
Petitioners,

v.

UNITED STATES OF AMERICA ex rel.
MICHAEL O'CONNOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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No. .....

THE STATE OF NEW JERSEY and

HOWARD YEAGER,

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v.

UNITED STATES OF AMERICA ex rel.

MICHAEL O'CONNOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The State of New Jersey and Howard Yeager pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled cause on January 2, 1969 with certified judgment in lieu of formal mandate stayed until March 25, 1969 per order of the United States Court of Appeals for the Third Circuit made on March 11, 1969.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 2, 1969. A petition for rehearing and stay of judgment was de-

cided by the Circuit Court of Appeals for the Third Circuit on March 11, 1969, wherein the motion for rehearing and stay was denied and the issuance of formal judgment in lieu of formal mandate was stayed until March 25, 1969. The jurisdiction of this court is invoked since the United States Court of Appeals for the Third Circuit has decided an important question of law which should be settled by the Court and a constitutional question is involved in the application of decisions of *Massiah* v. *U. S.*, 377 U. S. 201 (1964); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964); *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Johnson* v. *New Jersey*, 384 U. S. 1772 (1966) and *McLeod* v. *Ohio*, 381 U. S. 356 (1965), as same applied to the case of the *State of New Jersey* (Petitioner herein) v. *Michael O'Connor* (Respondent herein), wherein the defendant was convicted of the charge of murder on May 8, 1963.

How Federal Question Is Presented

The memoranda and order made by the Honorable Robert Shaw, U. S. District Court Judge on March 22, 1967 in connection with petition for Writ of Habeas Corpus (civil) 108-66 denied Michael O'Connor, petitioner, Writ of Habeas Corpus and considered therein the constitutional question involved herein. An appeal was taken therefrom to the U. S. Circuit Court of Appeals for the Third Circuit, which resulted in a judgment granting the petition for Writ of Habeas Corpus involving the same constitutional question.

Questions Presented

1. Should the U. S. Supreme Court decision in the case of *Massiah* v. *United States*, 377 U. S. 201 (1964), be applied to a guilty verdict returned in the Hudson County Court of the State of New Jersey on May 8, 1963?

2. Are statements made by Michael O'Connor on his apprehension in the State of New York and introduced in evidence at his trial in May of 1963, violative of defendant's constitutional rights without a determination as to whether or not said statements were made voluntarily?

Statement

The respondent herein Michael O'Connor on August 27, 1962 did fatally shoot another person in a bar room fight in Jersey City, New Jersey. He fled the jurisdiction of the State of New Jersey and was arrested as a fugitive from the State of New Jersey on November 22, 1962 and returned to New Jersey. He was tried by a jury of his peers, convicted of murder on May 8, 1963 and sentenced to life imprisonment. On June 22, 1964 the New Jersey Supreme Court affirmed the conviction (42 New Jersey 502) and on November 16, 1964 the U. S. Supreme Court denied certiorari (397 U. S. 916). On October 18, 1965 the said Michael O'Connor applied for Post Conviction Relief which was denied and from which denial, an appeal was taken to the New Jersey Supreme Court which dismissed on December 14, 1965. Michael O'Connor petitioned for a Writ of Habeas Corpus to the U. S. District Court (civil 108-66) which petition was on March 22, 1967 dismissed. He then appealed to the U. S. Court of Appeals for the Third Circuit (16708) which court on January 2, 1969 vacated the order of the said U. S. District Court and remanded with direction to issue Writ of Habeas Corpus without prejudice to the right of the State of New Jersey to undertake appropriate action in the further prosecution of this matter in accordance with the opinion of the court. The State of New Jersey herein applies for the issuance of a Writ of Certiorari to review the constitutional questions involved in the judgment of the U. S. Court of Appeals for the Third Circuit made January 2, 1969.

Reasons for Granting the Writ

It is the contention of petitioners that the Writ of Certiorari should be granted since the United States Court of Appeals for the 3rd Circuit misapplied or misconstrued the U. S. Supreme Court opinion in *Massiah* v. *U. S.*, 377 *U. S.* 201 (1964).

In *McCandless* v. *Furland,* 296 *U. S.* 140 and *Upshaw* v. *U. S.*, 335 *U. S.* 410, certiorari is often granted and the matter clarified through arguments and opinions where the Court of Appeals has allegedly misconstrued or misapplied the applicable Supreme Court opinion.

The question of the retroactiveness of Supreme Court cases of constitutional dimensions has always been the subject matter of great litigation. The review of the landmark decisions of the Supreme Court concerning the constitutional rights of the defendants shows that in each case there is a subsequent case dealing with the retroactiveness of the constitutional right. The Supreme Court has generally taken the view that there are three ways of applying newly enumerated principals to already decided cases. The first is typified by *Doherty* v. *Maxwell,* 376 *U. S.* 202 (1964), which applied *Gideon* v. *Wainwright,* 372 *U. S.* 335 (1963), retroactively to all cases where the defendant did not have the benefit of counsel at the time of his trial. The second category of retroactiveness is exemplified in cases such as *Linkletter* v. *Walker,* 381 *U. S.* 618, *Tehan* v. *U. S. ex rel. Shott,* 382 *U. S.* 406 (1966), which held that *Mapp* v. *Ohio,* 367 *U. S.* 643 (1961) and *Griffen* v. *California,* 380 *U. S.* 609 (1965), were to apply retroactively to only those cases where a final decision had not been rendered. By final adjudication, the Court meant that the judgment of conviction had been rendered and that the availability of the appeal exhausted and the time for certiorari had elapsed before the rendition of the decision. The third and final classification concerning the retroactive-

ness of the Supreme Court decisions is indicated in the case of *Johnson* v. *N. J.*, 384 *U. S.* 719 (1966), where the Court held that the decisions of *Escobedo* v. *Illinois* and *Miranda* v. *Arizona* apply only to trials commencing after the effective date of their decisions. Therefore, Miranda and Escobedo were to be given only perspective application and were not to apply retroactively.

The case of *Massiah* v. *U. S.* decided on May 18, 1964 by the Supreme Court left open the question of whether the rule enunciated therein is to be given perspective or retroactive application. This issue is the precise issue that is the subject matter of this Writ of Certiorari. The United States Court of Appeals, 3rd Circuit, has interpreted the Supreme Court holding in *Mc Leod* v. *Ohio*, 381 *U. S.* 356 (1965), as indicative of the Supreme Court's attitude to apply Massiah, *supra*, retroactively to all cases that have not yet reached final adjudication. As stated by the 3rd Circuit at pages 6 and 7 of its opinion:

> "By returning the case to the Ohio tribunals for retrial and reconsideration, the Court had indicated that Massiah is applicable, at a minimum, to all cases pending direct appeal on May 18, 1964, the date of the Massiah decision. On that date the appellant's case was still before the New Jersey Supreme Court."

This decision by the 3rd Circuit expressly overruled the District Court's holding that Massiah is not applicable due to the fact that this case was completed on May 8, 1963. See also *United States* v. *Fay*, 360 Fed. 2d 389 (2nd Cir. 1966).

Also, the 3rd Circuit in applying the rule of *Massiah* v. *U. S.* to the case at bar held that statements made by the defendant after he has been indicted and made without the benefit of counsel are to be vitiated regardless of whether or not they were voluntary. A review of the defendant's Writ of Habeas Corpus in no way indicates that the enu-

merating statements that he made, after his indictment and subsequent arrest, were coerced or involuntary. In commenting precisely this issue, the District Court in its opinion stated:

> "It is further observed that there is nothing in the record to indicate that the enumerating statement by petitioner was obtained under duress and was of involuntary nature, whereby the reliability and integrity and the truth finding process was open to question."

This issue was also considered by the Court in *Johnson* v. *N. J., supra,* when Justice Brennan in discussing the retroactiveness of Miranda and Escobedo stated that:

> "* * * our case law on coerced confessions is available for persons whose trials have already been completed, providing of course that the procedural prerequisites for direct or collateral attack are met. * * * Thus while Escobedo and Miranda provide important new safeguards against the use of unreliable statements at trial, the non-retroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim. * * *
>
> "We have pointed out above that past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions. See Haynes v. Washington, supra; Spano v. New York, supra. Prior to Escobedo and Miranda, however, we had expressly declined to condemn an entire process of in-custody interrogation solely because of such conduct by the police. See Crooker v. California, 357 U. S. 433 (1958); Cicenia v. Lagay, 357 U. S. 504 (1958). Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminat-

> ing statements * * * retroactive application of Escobedo and Miranda would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards."

Since Massiah is a case dealing with self-incriminating statements by the defendant, it is closely akin to Miranda and Escobedo. Therefore, since Miranda and Escobedo apply only perspectively, it would follow that Massiah should be so applied.

Conclusion

Due to the foreseeable ramifications concerning the interpretation of Massiah by the United States Court of Appeals for the 3rd Circuit, on the administration of the criminal law in our courts, it is the position of this petitioner that the retroactiveness of *Massiah* v. *United States* be clearly and unequivocally settled by the United States Supreme Court and therefore the Writ of Certiorari should be granted.

Respectfully submitted,

ABEL GOLDSTEIN,
Counsel for Petitioner.

March 19, 1969.

Appendix A.

MEMORANDUM AND ORDER

Civil 108-66

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY

UNITED STATES ex rel. MICHAEL O'CONNOR,

Petitioner,

v.

THE STATE OF NEW JERSEY and HOWARD YEAGER, Principal Keeper, New Jersey State Prison, Trenton,

Respondents.

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. 2241(a)(e)(3), et seq. He was convicted by a jury of murder in the first degree in the Hudson County Court on May 8, 1963, and was sentenced to life imprisonment pursuant to recommendation of the jury. The conviction was affirmed. *State* v. *O'Connor,* 42 N. J. 502, 201 A.2d 705 (1964). Certiorari was denied. 379 U. S. 916 (1964). Post conviction relief was sought and denied by the trial judge and a petition for review was dismissed by the New Jersey Supreme Court for lack of merit. Petitioner is presently confined in the New Jersey State Prison serving the life sentence. His State remedies have been exhausted and this Court has jurisdiction.

The grounds on which petitioner seeks the writ as set forth in his petition and supplemented by court-appointed counsel may be briefly summarized as follows:

1. He was arraigned on January 2, 1963 without counsel.

2. He was denied the assistance of competent counsel.

3. Prejudicial error was committed by the Prosecutor in his cross-examination of petitioner and of a defense witness and in other comments made on direct examination of a State witness, and also in summation to the jury.

4. Prejudicial error was committed by the court by its demeanor, severity of questioning petitioner, and facial expressions indicating to the jury that the testimony of petitioner was not credible.

5. The indictment was "illegal, unconstitutional, and void" because it charged petitioner separately by two counts with the commission of the crimes of murder and manslaughter.

6. The issue of petitioner's intoxication was not submitted to the jury.

7. Improper cross-examination of petitioner on the possession of $545 at the time of his arrest was tantamount to the introduction of evidence of prior crime with which defendant was charged but not convicted.

8. Interrogation of petitioner after indictment and at the time he was arrested bearing upon his flight from the scene of the crime was improper and admissions made by petitioner at that time should not have been admitted in evidence.

No rights or defenses were irretrievably lost at the time of arraignment. Petitioner pleaded not guilty. The applicable law with respect to this contention is set forth in *State* v. *Vogel,* 45 N. J. 400, 212 A.2d 560, 563 (1965):

> "'. . . under our practice an arraignment at which defendant pleads not guilty is not, per se, a critical stage

in a criminal proceeding. . . .' The sole function of an arraignment in New Jersey is to advise the defendant of the charges against him and to have him plead thereto, R.R. 3:5-1. By entering a plea of not guilty at that stage in the criminal proceedings a defendant does not adversely affect or prejudice any trial tactics or strategy which might best serve his cause.

* * * * * *

"The decisions of the United States Supreme Court are in accord with this position. See Hamilton v. State of Alabama, 368 U. S. 52 [citations omitted], and White v. State of Maryland, 373 U. S. 59 [citations omitted], considered in conjunction with Gideon v. Wainwright, 372 U. S. 335, making the standard of those cases applicable in non-capital state proceedings as well as federal. Those two cases, when considered together, stand for the proposition that if valuable defenses or other rights may be lost by a failure to raise them at a certain stage, counsel must be present."

An independent review of the entire record of the trial satisfies this Court that petitioner was represented by counsel who was loyal to his cause and competent by experience to furnish adequate representation to a defendant charged with the crime of murder. It is true that in the light of the adverse verdict,[1] that this record, like many others, can be combed to search out instances where an objection may have been made but was not made by defense counsel. It is a well recognized fact in trial practice that seasoned counsel for strategic reasons or otherwise refrain from making every objection which, by law, would be tenable. In *U. S.* v. *Cariola,* 323 F.2d 180, 185 (3rd Cir.

---

[1] If the jury had not recommended life imprisonment, the penalty could have been death.

1963) the court, by footnote stated the test of adequate representation in the following language:

> "The services of counsel meet the requirements of due process when he is a member in good standing at the bar, gives his client his complete loyalty, serves him in good faith to the best of his ability, and his service is of such character as to preserve the essential integrity of the proceedings as a trial in a court of justice. Only when the representation of an attorney is so lacking in competence or good faith that it becomes the duty of the trial judge or prosecutor as officers of the state to observe and correct it, is there a denial of due process. United States ex rel. Darcy v. Handy, 203 F.2d 407, 427 (3rd Cir. 1953)."

The trial judge in his opinion on the petition for post conviction relief stated:

> "Defendant's assigned trial counsel has been a member of the New Jersey Bar since November, 1922. He was an Assistant Prosecutor of Hudson County for a period of approximately five years from 1939 to 1944, during which period of time he tried criminal cases which averaged once a week while the courts were in session. He has defended indigent defendants as assigned counsel and tried may civil cases. It is an easy matter for a defendant to claim that counsel's professional performance is something less than what defendant, in retrospect, now claims it should have been. The defendant's disappointment in being convicted is not a proper basis for assailing the ability and character of a competent trial lawyer. Experience has taught those in the legal profession that the only time that a trial lawyer is considered 'great' by most clients is when he wins."

After the case was submitted to the jury, the trial court inquired whether petitioner was satisfied with counsel:

> "The Court: Before I remand the defendant to the Hudson County Jail pending the verdict in this case, Mr. O'Connor, would you stand up for a moment? As you know, Mr. Schumann is court assigned because of your indigent status, and Mr. Raino is appointed by order of the court. You need not answer this if you do not so desire to answer it. If you do, it will become part of the record. We have now completed this case and I should like to know, being the presiding judge, whether you are satisfied with the services rendered to you by Mr. Schumann, as court appointed counsel?
>
> The Defendant: Yes, sir.
>
> The Court: And have you been satisfied with the services rendered by Mr. Louis Raino, as your investigator?
>
> The Defendant: Yes, sir.
>
> The Court: Thank you for your answers."

The contention that there was prejudicial error of constitutional dimension committed by the Prosecutor in cross-examination of petitioner and a defense witness is without merit. The most that can be said with respect to this is that the Prosecutor might have been overzealous regarding petitioner's record of unemployment coupled with his possession of a substantial amount of money at the time of his arrest. It does appear, however, that on direct examination petitioner did not have any steady employment for at least a year prior to his arrest. He testified that he "worked on and off shaping up at the union hall." There was extensive cross-examination on this with emphasis upon the fact that he had $500 in his pocket when he was arrested. It appears further in the record that the amount may have been $545. Petitioner offered an ex-

planation for this saying that he had "hit the numbers." It also appears that he had collected unemployment insurance, workmen's compensation and had also received money from friends. There is no doubt that this testimony to which the Prosecutor referred in his summation suggested the inference that petitioner was not telling the truth as to the source of the money which he had on his person at the time of his arrest, but considered in the entire context of petitioner's testimony, it cannot be said that the cross-examination of the Prosecutor and his remarks in summation were tantamount to an accusation of the commission of another crime by reason of which petitioner procured the money. It would, however, affect his credibility which, as the New Jersey Supreme Court observed, was the primary issue in the case. The complaint about cross-examination of a defense witness does not merit discussion. A petition for a writ of habeas corpus is not a substitute for an appeal. *U. S. ex rel. Saunders* v. *Myers,* 276 F.2d 790 (3rd Cir. 1960).

It was urged at trial that the court committed prejudicial error in the severity of his examination of petitioner and by reason of facial expressions manifested upon the responses of petitioner to questions addressed by the court. In fact, counsel made strenuous objections to this stating that while the trial judge may not have been aware that his actions indicated lack of belief in the answers which petitioner gave to his questions, the conduct was highly prejudicial. The trial judge stated that he was not aware of the expressions of which counsel complained and in his charge he instructed the jury precisely and very carefully not to draw any inference adverse to the petitioner by reason of anything which he had done during the course of trial:

> "The actions and rulings of the Court should not in any way be taken by you as indicating how the Court may feel this case should be decided.

Appendix A.

"I charge you that the fact that the Court saw fit in some instances to direct questions to certain of the witnesses in the case must not influence you in any way in your deliberations. The fact that the Court saw fit to direct such questions does not indicate any opinion of the Court one way or the other as to the testimony given by such witnesses. The credit and belief to be given to the respective witnesses, both for the State and for the defense, must be determined by you and you alone. Any remarks made by the Court to counsel, or counsel to the Court, or between counsel, should not be considered in your deliberations. While the Court is not aware of any outward reactions on its part to any testimony given by the witnesses, I do, however, instruct you that if such reactions did occur, that you disregard the same, and not to draw any inferences therefrom, because as I stated before, the credit and belief to be given to the respective witnesses, both for the State and for the defense, should be determined by you and by you alone."

The indictment was drawn pursuant to R.R. 3:4-7 which provides:

"Two or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged, whether high misdemeanors or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

There is nothing unconstitutional about this rule and the Court perceives no prejudice to petitioner by reason of the fact that the indictment was drafted in accordance therewith.

Appendix A.

Petitioner did not contend that he was intoxicated at the time of the commission of the crime with which he was charged. In fact, the only evidence of possible intoxication came from the lips of a State witness, Harjes, on cross-examination. He said, "I thought that he was very drunk and it was time to get out of there." It was not part of the defense in this case that petitioner was intoxicated and there was no request to the trial judge to inject the issue of intoxication in his charge to the jury.

An incriminating admission made by petitioner with reference to flight from the scene of the crime was introduced on the State's case. Petitioner was interrogated at the time of his arrest and he admitted that he knew from reading a newspaper shortly after the crime had been committed that he was wanted by the Hudson County Police. Thereafter, he fled and was not apprehended until months later. At the time petitioner was interrogated he had been indicted, he was not represented by counsel nor was he advised of his constitutional right to refuse to answer any questions. If an incriminating statement such as was introduced here bearing upon flight from the scene of a crime was offered in a trial subsequent to June 22, 1964, the date of decision in *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), resolution of the question presented would not be free of difficulty. But the decision in *Escobedo* is to be applied prospectively. *Johnson* v. *New Jersey,* 384 U. S. 419 (1966). Petitioner emphasizes the application of *Massiah* v. *U. S.,* 377 U. S. 201 (1964) urging in effect that there is a distinction between in-custody interrogation after an indictment and interrogation before indictment. *Escobedo* makes no such distinction with respect to the accusatory stage. The court in that case stated:

> "In *Massiah* v. *U. S.,* 377 U. S. 201, this Court observed that 'a Constitution which guarantees a de-

fendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extra-judicial proceeding. Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' " Id., at 204, quoting Douglas, J., concurring in *Spano* v. *New York,* 360 U. S. 315, 326.

"*The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference.* When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of 'an unsolved crime.' *Spano* v. *New York,* 360 U. S. 315, 327 (Stewart, J., concurring). Petitioner had become the accused and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." (Emphasis supplied)

In *Johnson* the court stated:

"Because *Escobedo* is to be applied prospectively, this holding is available only to persons whose trials began after June 22, 1964, the date on which *Escobedo* was decided.

"As for the standards laid down one week ago in *Miranda,* if we were persuaded that they had been fully anticipated by the holding in *Escobedo,* we would measure their prospectivity from the same date. Defendants still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed. The disagreements among other courts concerning the implications of *Escobedo,* however, have impelled us to lay down additional guide-

lines for situations not presented by that case. This we have done in *Miranda,* and these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966."

The trial in this case was concluded on May 8, 1963, prior to either Massiah or Escobedo. See also *U. S.* v. *Fay,* 360 F.2d 389 (2nd Cir. 1966).

It is further observed that there is nothing in the record to indicate that the incriminating statement by petitioner was obtained under duress and was of involuntary nature whereby the reliability and integrity of the truth finding process was open to question. Moreover, the admission added little to other proofs of flight from which a guilty state of mind could be inferred. Court-appointed counsel in this proceeding properly refers to it as a peripheral fact not related directly to the homicide and petitioner's participation in the homicide.

The Court has not attempted to deal with each of the detailed contentions of petitioner, but has considered only those which it was felt merited some comment. Careful consideration of the entire record of the trial leads to the conclusion that either singly or in combination the alleged errors did not operate to estabish fundamental unfairness which would amount to a denial of due process. The most that can be said is that it might have been more desirable if there were less zealous advocacy on the part of the prosecution, but even here it is difficult to draw a fine line delineating the precise areas of restraint consistent with the Prosecutor's duty as an advocate of the public interest. He has the obligation to present the State's case in its best light, refraining only from acts and statements which would tend to induce the jurors to draw inferences of guilt not warranted by law..

The Court wishes to express its appreciation to court-appointed counsel, Matthew P. Boylan, Esq., for his com-

petent representation of petitioner in this proceeding. He undertook the gratuitous task of reviewing the record of the trial in this case and furnishing the Court with a well written brief raising and arguing every point that could be urged in support of the application for a writ of habeas corpus.

For the reasons hereinbefore stated, it is on this 22nd day of March, 1967, ORDERED that the petition for a writ of habeas corpus filed herein be and the same hereby is dismissed.

ROBERT SHAW
ROBERT SHAW
U. S. District Judge

Appendix B.

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Appeal from DISTRICT OF NEW JERSEY (Newark)

Case No. 16,708

Title of Case

UNITED STATES OF AMERICA ex rel. MICHAEL O'CONNOR,

Appellant

vs.

THE STATE OF NEW JERSEY and HOWARD YEAGER

No. below: Civil Action No. 108-66
Judge below: Robert Shaw

Attorney for Appellant
Pro Se

Attorney for Appellee
James A. Tumulty, Jr.

Date 1967 July 7

Account of Appellant
Forma Pauperis

Appendix B.

Date 1967	Filings—Proceedings
July 7	[Transferred from Misc. Record No. 673].
	1. Order (Staley, Chief Judge and *Kalodner* and Freedman, Circuit Judges) granting appellant leave to prosecute this appeal without prepayment of costs and fees or giving security therefor, to file typewritten briefs and appendix; and to docket and appeal and file the record, out of time, as of the date of this order, filed.
	Certified copy of above order to Clerk of District Court.
	Copy of Notice of Appeal, rec'd. April 11, 1967, filed.
	Record and exhibits, rec'd. May 9, 1967, filed.
	(Certified copy of order, dated April 5, 1967, by Robert Shaw, U.S.D.J. granting plaintiff-appellant a certificate of probable cause, rec'd. April 11, 1967, filed.)
July 17	Brief for appellant, filed. (4 typed copies). Proof of service in letter of 7/12/67.
July 17	2. Appendir to brief for appellant, filed. (4 typed copies). Proof of service in letter of 7/12/67.
Aug. 10	3. Motion by appellant for appointment of counsel, filed.
Sept. 11	Submitted on motion by appellant for appointment of counsel. Coram: Kalodner, Freedman and Seitz, Circuit Judges.

Sept. 25 4. Order (*Kalodner,* Freedman and Seitz, Circuit Judges) denying appellant's motion for appointment of counsel, filed.

1968

July 17 5. Motion by appellee for leave to file brief and appendix out of time by July 15, 1968, in typewritten form, filed. (4 copies). Proof of service in letter of July 17, 1968.

July 29 Above motion submitted. (Hastie, Chief Judge).

Aug. 6 6. Order (*Hastie,* Chief Judge) granting appellee leave to file typewritten brief and appendix out of time as of the date of this order, filed.

Aug. 6 7. Brief and appendix for appellee, rec'd. July 16, 1968, filed.

Aug. 6 Affidavit of mailing on July 15, 1968, rec'd. July 16, 1968, filed.

Aug. 6 Reply Brief for Appellant, filed. (4 typed copies).

Aug. 6 Affidavit of service of above, filed.

Oct. 24 Submitted on briefs. Coram: Hastie, Chief Judge, and Seitz and Aldisert, Circuit Judges.

1969

Jan. 2 8. Opinion of the Court (Hastie, Chief Judge, and Seitz and *Aldisert,* Circuit Judges), filed.

Jan. 2 9. Judgment vacating the order of the District Court, filed March 22, 1967 and remanding the cause with direction to the District

Court to issue a writ of habeas corpus to Appellant without prejudice to the right of the State of New Jersey to undertake appropriate action in the further prosecution of this matter in accordance with the opinion of this Court, filed.

Mar 3 10. Motion by counsel for appellee for stay of the mandate, filed.

Mar 11 11. Order (Hastie, Chief Judge and Seitz and *Aldisert,* Circuit Judges) staying the issuance of the certified judgment in lieu of formal mandate until March 25, 1969; and denying appellees' motion for oral argument on the merits before the panel; and for stay of the judgment of this Court, entered January 2, 1969.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,708

C.A. MISC. RECORD No. 673

UNITED STATES OF AMERICA ex rel.
MICHAEL O'CONNOR,

Appellant,

vs.

THE STATE OF NEW JERSEY and HOWARD YEAGER

Present: STALEY, *Chief Judge,* KALODNER and FREEDMAN, *Circuit Judges.*

Upon consideration of appellant's motion for leave to proceed in forma pauperis and the supporting affidavit of poverty, and to file typewritten memorandum and appendices, and the lack of opposition thereto, all in the above-entitled case,

It is ORDERED that appellant be, and he hereby is granted leave to prosecute this appeal without prepayment of costs and fees or giving security therefor, and to file typewritten briefs and appendix;

It is Further ORDERED that leave be and it hereby is granted appellant to docket the appeal and file the record out of time, as of the date of this order.

By the Court,

KALODNER,
Circuit Judge.

Dated: July 7, 1967

RECEIVED & FILED
JUL 7 1967
THOMAS F. QUINN
Clerk

Appendix B.

RECEIVED
AUG 10 1967

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,708

C.A. MISC. RECORD NO. 673

UNITED STATES OF AMERICA ex rel.
MICHAEL O'CONNOR,

Appellant,

vs.

THE STATE OF NEW JERSEY,
and HOWARD YEAGER,

Respondents.

RECEIVED & FILED
AUG 10 1967
THOMAS F. QUINN
Clerk

MOTION FOR THE ASSIGNMENT OF COUNSEL TO PROSECUTE APPEAL

TO THE HONORABLE: STALEY, *Chief Judge,* KALODNER and FREEDMAN, *Circuit Judges.*

The appellant, MICHAEL O'CONNOR, hereby moves this Honorable Court for the assignment of counsel to assist him in prosecuting this appeal in the above entitled matter.

Respectfully submitted,

MICHAEL O'CONNOR
MICHAEL O'CONNOR, Appellant

Appendix B.

AFFIDAVIT OF POVERTY

DATED: August 8th, 1967

STATE OF NEW JERSEY
COUNTY OF MERCER } ss.:

I, Michael O'Connor, being first duly sworn, according to law, upon my oath, deposes and says:

1. I am the appellant in the above entitled cause of action.

2. I have heretofor, on July 7th, 1967, been granted leave to proceed in forma pauperis, based upon an affidavit fully setting out the facts establishing my poverty.

3. I am unable to obtain counsel to defend me in this matter for the reason that I am an indigent person.

4. I further swear that because of my poverty I am unable to obtain funds from anyone, including my family and associates, by way of compensation for counsel and represent that the following relating in my ability to obtain counsel to prosecute this appeal are true:

(a) I am presently an inmate nurse in the hospital at the New Jersey State Prison in Trenton, New Jersey and my salary therefor is approximately $6.00 per month;

(b) I do not own or possess any moneys, stocks, real estate, bonds, securities, buildings and loan shares or any other asserts, excluding approximately $10.00, which is in custody of the Warden of this Prison in my savings account;

(c) In making this affidavit I am aware that false swearing in a misdemeanor, and that the punishment for false swearing is imprisonment for not more than three years, or a fine of not more than $1,000.00, or both.

MICHAEL O'CONNOR
MICHAEL O'CONNOR, AFFIANT

SWORN AND SUBSCRIBED TO BEFORE ME
THIS 8TH DAY OF AUGUST, 1967.

WM. N. DEAN

WILLIAM N. DEAN

My Commission Expires June 13, 1971
NOTARY PUBLIC OF NEW JERSEY

AUG—8 1967

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16708

UNITED STATES OF AMERICA ex rel.
MICHAEL O'CONNOR,

Appellant,

vs.

THE STATE OF NEW JERSEY AND HOWARD YEAGER

Present: KALODNER, FRIEDMAN and SEITZ, *Circuit Judges.*

Upon consideration of appellant's motion for the assignment of counsel to prosecute the appeal in the above-entitled case,

It is ORDERED that the motion for the appointment of counsel be and it hereby is denied.

By the Court,

KALODNER,
Circuit Judge.

Dated: September 25, 1967

RECEIVED & FILED
SEP 25 1967
THOMAS F. QUINN
Clerk

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

PHILADELPHIA PA.

Docket No. 16,708

Civil Action

AFFIDAVIT AND MOTION TO EXTEND TIME FOR FILING BRIEF AND SEEKING PERMISSION TO FILE TYPEWRITTEN BRIEF AND APPENDIX.

UNITED STATES ex rel., MICHAEL O'CONNOR,

Petitioner,

v.

THE STATE OF NEW JERSEY and HOWARD YEAGER, Principal Keeper, New Jersey State Prison, Trenton, New Jersey, et seq.

Respondents.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss.:

ABEL GOLDSTEIN, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am an Assistant Prosecutor for the County of Hudson, State of New Jersey, assigned to the above entitled matter.

2. This office was in receipt of notice of appeal from decision of the United States District Court, District of New Jersey, denying petition of Michael O'Connor for

Appendix B.

Writ of Habeas Corpus. No brief was filed since we awaited the filing of brief on appeal by petitioner. This office was subsequently advised that the petition filed by Michael O'Connor was being accepted as his brief and we thereupon proceeded with brief of the State of New Jersey forwarded for filing on July 15, 1968.

3. The State of New Jersey respectfully requests permission extending time to file its brief to July 15, 1968 and further requests permission to file brief in typewritten form.

ABEL GOLDSTEIN

Abel Goldstein

Sworn to and subscribed
before me this 16th day
of July, 1968.

MURIEL I. OCHS

Muriel I. Ochs
Notary Public of New Jersey
My commission expires 1/25/71

RECEIVED & FILED
Jul 17 1968
THOMAS F. QUINN
Clerk

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,708

UNITED STATES OF AMERICA ex rel.
MICHAEL O'CONNOR,

Appellant,

vs

THE STATE OF NEW JERSEY and HOWARD YEAGER

Upon consideration of appellee's motion for leave to file brief and appendix out of time in typewritten form, and the lack of opposition thereto, both in the above-entitled case,

It is ORDERED that appellee be and hereby is granted leave to file typewritten brief and appendix out of time as of the date of this order.

By the Court,

WILLIAM H. HASTIE,
Chief Judge.

Dated: Aug 6, 1968

RECEIVED & FILED
AUG 6 1968
THOMAS F. QUINN
Clerk

Appendix B.

OPINION OF THE COURT

(Filed January 2, 1969)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16708

UNITED STATES OF AMERICA ex rel.
MICHAEL O'CONNOR,

Appellant,

v.

THE STATE OF NEW JERSEY and HOWARD YEAGER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Submitted October 24, 1968

Before HASTIE, *Chief Judge,* and SEITZ and
ALDISERT, *Circuit Judges.*

RECEIVED & FILED
JAN 2 1969
THOMAS F. QUINN
Clerk

ALDISERT, *Circuit Judge*

Three months after appellant was indicted for murder by a state grand jury in New Jersey, he was arrested in New York as a fugitive felon and returned to New Jersey

for prosecution.[1] He was then interrogated by police officers who did not advise him of his right to remain silent; at this time he was not represented by counsel. Certain incriminating statements made by him at this interrogation were introduced at trial.[2] He was convicted on May 8, 1963, and sentenced to life imprisonment.

The New Jersey Supreme Court affirmed the conviction on June 22, 1964;[3] the United States Supreme Court denied certiorari on November 16, 1964.[4] He availed him-

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[1] The indictment charged the defendant in two counts of murder and manslaughter. The victim was fatally shot in a bar-room fight in Jersey City, New Jersey, on August 27, 1962. Prosecution witnesses testified that there was a scuffle between the victim and the defendant during which the gun discharged.

[2] Trial counsel did not object to the admission of this testimony, but this does not constitute a waiver which would preclude raising the issue on appeal. The Supreme Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege". Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed 2d 837 (1963). Moreover, considering the law at the time of O'Connor's trial, it would have been a futile gesture to have objected to its admission. Under such circumstances, this Court has repeatedly held that the failure to object does not constitute a waiver. U.S. ex rel. Mancini v. Rundle, 337 F.2d 268 (3 Cir. 1964); U.S. ex rel. Campbell v. Rundle, 327 F.2d 153 (3 Cir. 1964); U.S. ex rel. Wade v. Yeager, 377 F.2d 841 (3 Cir. 1967). See "Problems in Federal Habeas Corpus Involving State Prisoners", by Circuit Judge Donald P. Lay (8 Cir.), 45 F.R.D. 45, 58 (1968). Judge Lay suggests that "the same kind of technical forfeiture and waiver [failure of counsel to raise basic constitutional issues at trial] when offered to dispose of constitutional claims of state prisoners bringing federal habeas corpus actions, is generally abhorred by the Supreme Court, as is clear in Fay v. Noia, and in the host of cases that have followed that ruling. See, e.g., Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964); U.S. ex rel. McLemore v. Russell, 371 F.2d 554 (3 Cir. 1967); Noble v. Sigler, 351 F.2d 673 (8 Cir. 1965)."

[3] State v. O'Connor, 42 N.J. 502, 201 A.2d 705.

[4] 379 U.S. 916.

self of the appropriate state post-conviction procedures,[5] and then sought habeas corpus relief in the District Court.[6] He now appeals from the order of the court below denying relief.

We must decide whether the introduction at his state trial of post-indictment incriminating statements made without counsel violated constitutional principles enunciated in Massiah v. United States, 377 U.S. 201, decided on May 18, 1964, while appellant's case was on direct appeal.[7]

The District Court concluded that although O'Connor was interrogated after indictment while he was without counsel and not advised of his right to remain silent, the rule of *Massiah* was nonetheless subject to the same retroactive limitation as *Escobedo* and *Miranda*.[8]

Before we reach the question of whether the *Massiah* ruling enunciated in 1964 may be applied to the 1963 trial of this appellant, it is necessary to decide if the present appeal falls within the substantive rule of that case. If it does not, then the chronology of the cases becomes an immaterial point.

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[5] New Jersey post-conviction relief was sought on February 23, 1965, and denied by the trial court on October 18, 1965. The New Jersey Supreme Court dismissed an appeal from the judgment denying relief on December 14, 1965.

[6] Pursuant to 28 U.S.C. 2241 (a), (e) (3), et seq.

[7] Appellant concedes that under the non-retroactive rule of Johnson v. New Jersey, 384 U.S. 719 (1966), the principles of Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966) have no application. Under the *Johnson* rule, *Escobedo* affects only those cases in which the trial began after June 22, 1964; *Miranda*, those trials which began after June 13, 1966.

[8] In its order and opinion dismissing the petition, the District Court observed that: "If an incriminating statement such as was introduced here bearing upon flight from the scene of a crime was offered in a trial subsequent to June 22, 1964, the date of decision in Escobedo v. Illinois, 378 U.S. 478 (1964), resolution of the question presented would not be free of difficulty."

Appendix B.

The defendant in *Massiah* was accused of a federal narcotics offense. Following his arrest, he retained counsel, was indicted, pleaded not guilty, and was released on bail. While he was free on bail, a federal agent, with the cooperation of a co-defendant, surreptitiously monitored a conversation between Massiah and the co-defendant. The substance of the conversation containing incriminatory statements was introduced at trial, and he was convicted. The Supreme Court held that the introduction of the extrajudicial statements violated the accused's Sixth Amendment right to the aid of counsel, stating:

> "This view no more than reflects a constitutional principle established as long ago as Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, where the court noted that '* * * during perhaps the most critical period of the proceedings * * * that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, the defendants * * * [are] as much entitled to such aid [of counsel] during that period as at the trial itself.' " 377 U.S. at 205.

Citing Gideon v. Wainright, 372 U.S. 335 (1963), *inter alia,* the Court continued: "The same basic constitutional principle has been broadly reaffirmed by this Court." But the Court then added: "Here we deal not with a state court conviction, but with a federal case, where the specific guarantee of the Sixth Amendment directly applies." This was an obvious implication that the rule of *Massiah* was to apply only to federal prosecutions,[9] although the reasoning

[9] See Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed. 2d 1479 (1957) and McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), both of which were exercises of the Supreme Court's supervisory powers over the administration of the federal courts and not applicable to state prosecutions.

in the opinion was expressed in terms of "basic constitutional principles". The opinion concluded:

> "All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at trial." 377 U.S. at 207.

Massiah left three important questions unanswered: (1) Was it applicable only to federal prosecutions? (2) Was it restricted to special "circumstances" or did it confer an absolute right to counsel in all cases following indictment? (3) Was it to be applied retroactively?

The first of these questions was answered in Lyles v. Beto, 379 U.S. 648 (1965). The defendant in *Lyles* had been convicted of burglary in a state prosecution. His extrajudicial confession given after indictment while not represented by counsel was introduced at trial. Relying on Spano v. New York, 360 U.S. 315 (1959),[10] Crooker v. California, 357 U.S. 433 (1958) and Cicenia v. California, 357 U.S. 507 (1958), the Fifth Circuit held that there was no absolute right to counsel after indictment which, absent a showing of special circumstances, vitiated the validity of voluntarily-given statements by the accused.

Without opinion, the Supreme Court remanded the case "for reconsideration in light of Massiah v. United

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[10] The *Spano* decision held that incriminating statements obtained through interrogation after indictment while the defendant was not represented by counsel were inadmissible because of the particular circumstances of the case. Four justices concurring were of the opinion that there was an absolute right to counsel after indictment and that statements obtained from a defendant without counsel were inadmissible at trial.

States". The clear implication of this action was that *Massiah* applied to both federal and state prosecutions.[11]

Whether *Massiah* would be applied selectively to special "circumstances" was a question that remained,[12] but one which was to find an answer in McLeod v. Ohio, 381 U.S. 356 (1965). Convicted in an Ohio prosecution, McLeod challenged the admission of his extrajudicial statements made voluntarily after indictment without counsel. The incriminatory remarks were unsolicited by the police without any element of trickery, deception or subterfuge.

The Ohio Supreme Court dismissed the appeal as presenting "no debatable constitutional question".[13] The United States Supreme Court granted certiorari and, as it had done in *Lyles,* remanded the case for "consideration in light of Massiah v. United States".[14]

On remand, the Ohio court, with two justices dissenting, determined that because McLeod's statements were volunteered without police solicitation, there being no circumstances of trickery or subterfuge present, the rule of *Massiah* was not controlling. The Supreme Court again granted certiorari and reversed the conviction without opinion "on the authority of Massiah v. United States". 381 U.S. 356.

By its disposition of *McLeod* the Court has said, in effect, that *Massiah* commands an absolute right to counsel

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[11] The application of *Massiah* to state prosecutions has since been recognized in the following state decisions: Commonwealth v. Coyle, 427 Pa. 72, 233 A.2d 542 (1967); Elliott v. Warden, 243 Md. 627, 222 A.2d 55 (1966); State v. Blanchard, 44 N.J. 195, 207 A.2d 681 (1965). See also 79 Harvard L. Rev. 935, 999 (1966).

[12] The three justices dissenting in *Massiah* interpreted the majority opinion as excluding "all admissions made to the police, no matter how voluntary and reliable". 377 U.S. at 209.

[13] Ohio v. McLeod, 173 Ohio St. 520, 184 N.E.2d 101 (1962).

[14] McLeod v. Ohio, 378 U.S. 582 (1964).

after indictment, thereby vitiating the validity of all oral communications between the defendant and the police made in the absence of counsel.[15] The "investigatory v. accusatory" test of *Escobedo* and the "in custody" test of *Miranda,* employed to determine when the right to counsel attaches, have no application once the indictment has formally stamped the suspect as *the* defendant; only a clear, explicit, and intelligent waiver may legitimate interrogation without counsel following indictment.

Four days prior to the Supreme Court's final decision in *McLeod,* this Court had occasion to review the impact of *Massiah* in United States ex rel. Russo v. New Jersey, 351 F.2d 429 (3 Cir. 1965).[16] Although *Russo* involved a pre-indictment interrogation, we noted that under the authority of *Escobedo* and *Massiah*:

> "Where the right [to counsel] attaches any confession obtained in the absence of counsel must be suppressed independent of any issue of the voluntariness of the confession." 351 F.2d at 436.

The final decision in *McLeod* four days later confirmed this interpretation.[17]

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[15] As a consequence of the *McLeod* decision, the Supreme Court of New Jersey, from which state conviction this appellant appeals, has since reversed its prior interpretation of *Massiah* which had confined its application to special circumstances. In State v. Green, 46 N.J. 192, 215 A.2d 546 (1965), the court concluded that: "In the light of *McLeod* we must now interpret *Massiah* as holding that after a defendant is indicted any statement elicited by the police in the absence of counsel is inadmissible even where the statement is voluntarily given." 215 A.2d at 551.

[16] *Russo* was decided on May 20, 1965; *McLeod,* on May 24, 1965.

[17] After the decision in *Russo,* a petition for rehearing on the question of retroactivity was presented. In a *per curiam opinion* filed with the court's opinion per Chief Judge Biggs, we declined to rule on the question as not having been timely raised. As it relates to *Russo* and *Escobedo,* the Supreme Court's holding in *Johnson* settled the question.

The import of *McLeod* to the case at bar, however, goes beyond a determination that *Massiah* has recognized an absolute right to counsel after indictment. By returning the case to the Ohio tribunals for retrial and reconsideration, the Court has indicated that *Massiah* is applicable, at a minimum, to all cases pending direct appeal on May 18, 1964, the date of the *Massiah* decision.[18] On that date the appellant's case was still before the New Jersey Supreme Court. We therefore hold that the District Court below erred when it concluded that the appellant could not avail himself of the *Massiah* doctrine even though his case qualified as one being on direct appeal.[19]

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[18] That the Supreme Court denied certiorari to this appellant is "without substantive signifiance". United States v. Baldi, 344 U.S. 561, 73 S.Ct. 391 (1953); Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397 (1953).

[19] There is nothing novel about this limited concept of "retroactivity", if it may technically be called such. The same procedure was followed in the implementation of the exclusionary rule of Mapp v. Ohio, 367 U.S. 643 (1961), in Linkletter v. Walker, 381 U.S. 618 (1965), where it was held that although *Mapp* would receive only prospective application, nonetheless, all cases not finally determined at the time of the *Mapp* decision would be governed by its rule. The Court said: "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision . . ." 381 U.S. at 622, note 5. This concept was applied by this Court in Wade v. Yeager, 377 F.2d 841 (3 Cir. 1967). A similar conclusion was reached in Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), which declined to give full retroactivity to the doctrine of Griffin v. California, 380 U.S. 609 (1965) but recognized it as authority for all cases pending on direct appeal at the time of its decision.

The position of the court below, that *Massiah* should not be applied to any cases tried before the date of its decision, has received some support in other circuits. In Lyles v. Beto, 362 F.2d 503 (5 Cir. 1966), one of the cases which was remanded by the Supreme Court "in light of Massiah", the court determined on

(*Footnote continued on following page*)

Appendix B.

Having decided that the incriminating statements of the defendant were not properly admissible, we must now determine whether their use amounted to "harmless error". Under the rule of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), certain constitutional defects may not be grounds for reversal of a conviction if the court finds them to have been "harmless beyond a reasonable doubt".

During O'Connor's trial, the state seized upon his statements made at interrogation that while in New York before his arrest he knew the New Jersey police were looking for him. These statements were introduced, commented upon in the prosecution's closing argument, and included in the trial court's charge as indicative of wilful

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(*Footnote continued from previous page*)

rehearing that the rule of Johnson v. New Jersey controlled *Massiah* as well as *Escobedo* and *Miranda*. However, it should be emphasized that in *Lyles,* the state conviction had become final long before the *Massiah* decision. Similarly, in United States ex rel. Romano v. Fay, 360 F.2d 389 (2 Cir. 1966), a pre-*Johnson* decision, the court held that *Escobedo* and *Massiah* were not to be afforded retroactive application. As in *Lyles,* however, the court was confronted with the question of "habeas corpus retroactivity", since Romano's conviction had become final before *Massiah*. Thus, the results in *Lyles* and *Romano* are not at variance with *McLeod*.

The applicability of *Massiah* to cases pending direct appeal at the time of its enunciation has been recognized by the First Circuit in Hancock v. White, 378 F.2d 479 (1 Cir. 1967). Relying on *McLeod,* the court held that the introduction of post-indictment incriminatory statements by a defendant without counsel was prohibited by *Massiah* and applied to cases which were not finally determined when *Massiah* was decided. As in the present case, the question of the ultimate retroactive application afforded *Massiah* was not reached.

See also Elliott v. Warden, 243 Md. 627, 222 A.2d 55 (1966), where the court refused to apply *Massiah* retroactively but reserved its opinion on the application of *Massiah* to cases not finally litigated at the time of the *Massiah* decision.

flight to avoid prosecution and hence evidence of guilt. The appellee now seeks to characterize the statements as "not inculpatory admissions concerning the central fact of guilt".[20] To argue that such statements were not inculpatory admissions raises the question: If they were not, for what purpose were they introduced?

In his classic treatise on evidence, Professor Wigmore notes that:

> "It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." 2 Wigmore § 276.

In Embree v. United States, 320 F.2d 666 (9 Cir. 1963), the court observed that: "The conduct of an accused person in seeking to flee following the commission of an alleged crime may be circumstantially relevant to prove both the commission of the act and the intent and purpose with which it was committed." 320 F.2d at 668.

The jury that convicted O'Connor was entrusted not only with deciding his guilt, but also with determining the degree of felonious homicide, i.e., first or second degree murder or manslaughter. Admission of defendant's state-

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[20] The state also asserts that the introduction of these statements was not prejudicial because the defendant "took the stand and voluntarily gave a detailed description and disclosure of his flight". The Supreme Court has recently emphasized that "the question is not *whether* the petitioner made a knowing decision to testify, but *why*." In Harrison v. United States, —— U.S. ——, 88 S.Ct. 2008 (1968), the Court held that where unconstitutionally obtained evidence was introduced against a defendant who thereafter testified to explain or mitigate the impact of the admission, the burden was on the government to "show that its illegal action did not induce his testimony". We are convinced that the state made no such showing in the present case.

ment, inferring flight and guilt may have been a critical factor in the jury's finding of malice and premeditation necessary for his conviction of first degree murder.[21] Where such possibility, if not probability, exists, the introduction of constitutional error cannot be characterized as harmless beyond a reasonable doubt.[22] A defendant in a criminal case is as entitled to a proper determination of the degree of guilt as he is to a determination of the question of guilt itself.

Accordingly, we will vacate the order of the court below and remand the case with the direction that the District Court issue a writ of habeas corpus to O'Connor without prejudice to the right of the State of New Jersey to undertake appropriate action in the further prosecution of this matter.

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[21] See U.S. ex rel. Johnson v. Yeager, 399 F.2d 508 (3 Cir. 1968), where this court viewed the introduction of improper evidence as "substantial, perhaps even critical" to the question of the degree of guilt. No less can be said of the present appeal in light of the circumstances surrounding the homicide.

[22] Because we decide that this was not harmless error, we do not reach the question of whether a violation of the *Massiah* rule requires an automatic reversal without the necessity of applying the *Chapman* test. In this respect, see Commonwealth ex rel. Firmstone v. Myers, —— Pa. ——, 246 A.2d 371 (1968), where the court held that a violation of the rule of White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed. 2d 193 (1963), requiring the assistance of counsel at any "critical stage" in criminal proceedings, mandates "an automatic reversal without regard to whether the error could have been harmless".

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,708

UNITED STATES OF AMERICA ex rel.
MICHAEL O'CONNOR,

Appellant,

vs.

THE STATE OF NEW JERSEY and HOWARD YEAGER

(D. C. Civil Action No. 108-66)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: HASTIE, *Chief Judge,* and SEITZ and ALDISERT, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed March 22, 1967, be, and the same is hereby vacated and the cause remanded with direction to the District Court to issue a writ of habeas corpus to Appellant without prejudice to the right of the State of New Jersey to undertake appropriate action in the further prosecution of this matter in accordance with the opinion of this Court.

ATTEST:
THOMAS F. QUINN,
Clerk.

January 2, 1969

RECEIVED & FILED
JAN 2 1969
THOMAS F. QUINN
Clerk

Appendix B.

NOTICE OF MOTION

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 16708

UNITED STATES OF AMERICA ex rel.
MICHAEL O'CONNOR,

Appellant,

—vs—

THE STATE OF NEW JERSEY and HOWARD YEAGER,

Appellees.

To: MICHAEL O'CONNOR, Pro Se

PLEASE TAKE NOTICE that the State of New Jersey and Howard Yeager, on a date to be fixed by this Court, will move before this Honorable Court:

(a) For a stay of issuance of mandate on judgment of the United States Court of Appeals for the Third Circuit, filed in the above matter on January 2, 1969, to enable the State of New Jersey and Howard Yeager to petition the United States Supreme Court for a Writ of Certiorari to review said decision.

(b) To obtain order from the United States Court of Appeals for the Third Circuit for a hearing on oral argument of the issue involved, which was not heretofore held.

(c) For a hearing before the United States Court of Appeals en banc.

(d) That the judgment entered in this cause on January 2, 1969 be stayed, pending the final determination of the cause by the Supreme Court of the United States.

RECEIVED & FILED
MAR 3 1969
THOMAS F. QUINN
Clerk

The Appellee was convicted in the Hudson County Court of the State of New Jersey by a jury of his peers on May 8, 1963 and sentenced to life imprisonment. The New Jersey Supreme Court affirmed the conviction on June 22, 1964 and the United States Supreme Court denied certiorari on November 16, 1964. The Appellant availed himself of appropriate State Post Conviction procedure and then sought Habeas Corpus relief in the United States District Court which was dismissed March 23, 1967 and which Order was vacated in the United States Court of Appeals for the Third Circuit, 16,708, on January 2, 1969. This case involves a constitutional question referring to the retroactive application of *Miranda* v. *Arizona,* 384 *U.S.* 436 (1966) and *Escobedo* v. *Illinois,* 378 *U.S.* 478 (1964) and the application of the decision in *McLeod* v. *Ohio,* 378 *U.S.* 582 (1968) thereto.

The United States District Court for the District of New Jersey (Newark), in Civil Action 108-66, did on March 23, 1967 dismiss Appellee's petition for Writ of Habeas Corpus.

James A. Tumulty, Jr.
Prosecutor of Hudson County

By: ABEL GOLDSTEIN
Abel Goldstein
Attorney for Appellees

Copy of Notice of Motion forwarded by Registered Mail to Appellant, Michael O'Connor, at New Jersey State Prison, Drawer N., Trenton, New Jersey, 08625.

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16,708

UNITED STATES OF AMERICA ex rel. MICHAEL O'CONNOR,

Appellant

vs.

THE STATE OF NEW JERSEY and HOWARD YEAGER

Present: HASTIE, *Chief Judge,* and SEITZ and ALDISERT, *Circuit Judges.*

Upon consideration of appellees' motion for stay of mandate, for oral argument on the merits before this Court sitting en banc, and for stay of the judgment of this Court, entered January 2, 1969, all in the above-entitled case.

It is ORDERED that the issuance of the certified judgment in lieu of formal mandate be and hereby is stayed until March 25, 1969; and

It is Further ORDERED that appellees motion for oral argument on the merits before the panel, and for stay of the judgment of this Court, entered January 2, 1969, be and hereby is denied.

By the Court,

RUSS SEITZ
Circuit Judge

Dated: March 11, 1969

RECEIVED & FILED
Mar 11 1969
THOMAS F. QUINN
Clerk

Appendix B.

I, THOMAS F. QUINN, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original appendices and proceedings in this Court in the case of U.S.A. ex rel. Michael O'Connor, Appellant vs. The State of New Jersey, etc. No. 16,708,

on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have *hereunto* subscribed my name and affixed the seal of the said Court, at Philadelphia, this 18th day of March 1969,

Thomas F. Quinn
Clerk of the U. S. Court of Appeals,
Third Circuit.

(SEAL)